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12 **UNITED STATES BANKRUPTCY COURT**
13 **DISTRICT OF NEVADA**

14 In re:

15 USA COMMERCIAL MORTGAGE
16 COMPANY,

17 Debtor.

18 Case No. BK-S-06-10725-LBR
19 Chapter 11

20 **SECOND OMNIBUS OBJECTION
21 OF USACM TRUST TO PROOFS OF
22 CLAIM BASED IN PART UPON
23 INVESTMENT IN THE COMVEST
24 LOAN**

25 **Date of Hearing: August 30, 2011**
26 **Time of Hearing: 10:30 a.m.**
27 **Estimated Time for hearing: 10 min.**

28 The USACM Liquidating Trust (the “USACM Trust”) moves this Court, pursuant
29 to § 502 of title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”) and
30 Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for an
31 order disallowing in part the Proofs of Claim listed in **Exhibit A**. These claims were filed
32 by investors (“Direct Lenders”) against USA Commercial Mortgage Company
33 (“USACM”) based upon investment in multiple loans, including a loan to ComVest
34 Capital Satellite Arms, Inc. (the “Borrower”). This loan was sometimes referred to as the
35 “ComVest Loan” and that is how the USACM Trust will refer to it here. This Objection is
36 supported by the Court’s record and the Declarations of Geoffrey L. Berman and Edward
37 M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the Investment
38 in the ComVest Loan (the “Berman Decl.” and “Burr Decl.”).

1 THIS OBJECTION DOES NOT RELATE TO AND WILL NOT IMPACT THE
2 DIRECT LENDERS' RIGHTS TO REPAYMENT ON THE COMVEST LOAN, SHARE
3 IN ANY PROCEEDS GENERATED FROM THE SALE OF THE REAL PROPERTY
4 SECURING THE COMVEST LOAN, OR SHARE IN THE RECOVERY OF ANY
5 FUNDS FROM THE GUARANTOR FOR THE LOAN.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. BACKGROUND FACTS**

8 **a. The USACM Bankruptcy**

9 On April 13, 2006 ("Petition Date"), USACM filed a voluntary petition for relief
10 under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as
11 debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
12 Debtor's post-petition management of the Debtor was under the direction of Thomas J.
13 Allison of Mesirow Financial Interim Management, LLC, who served as the Chief
14 Restructuring Officer.

15 USACM was a Nevada corporation that, prior to the Petition Date, was in the
16 business of underwriting, originating, brokering, funding and servicing commercial loans
17 primarily secured by real estate, both on behalf of investors and for its own account. That
18 business included the solicitation of investors to purchase fractional interest in loans that
19 USACM originated and then serviced. These investors are referred to as "Direct Lenders"
20 in USACM's bankruptcy case and in this Objection.

21 On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third
22 Amended Joint Chapter 11 Plan of Reorganization" as Modified Herein [Docket No.
23 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this
24 Court, USACM sold the servicing rights to most of the loans it serviced to Compass
25 Partners, LLC and Compass Financial Partners, LLC ("Compass"), including the ComVest
26 Loan. The sale to Compass closed on February 16, 2007.

1 The USACM Trust exists as of the Effective Date of the Plan, which was March 12,
2 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the
3 successor to USACM with respect to standing to seek allowance and disallowance of
4 Claims under 11 U.S.C. § 502(a).

5 Upon information derived from filings in the United States District Court, District
6 of Nevada, *3685 San Fernando Lenders Company, LLC, et al v. Compass USA SPE, LLC,*
7 *et al*, No. 2:07-cv-00892-RCJ-GWF action, the Trust believes that “Silar Advisors, LP
8 (“Silar”) financed Compass’ acquisition of the Purchased Assets, including the loan
9 service agreements in the USACM bankruptcy case and took a secured interest in those
10 Purchased Assets by executing a Master Repurchase Agreement (“Repurchase
11 Agreement”) with Compass, and by filing a UCC-1 financing statement with the State of
12 Delaware.” *Id.* Docket 1250 at 13-14 (citations to declarations omitted).

13 Further, from filings in the same action, the Trust believes that “Effective as of
14 September 26, 2007, Silar foreclosed on Compass through Asset Resolution LLC (“Asset
15 Resolution”) and took ownership of the Purchased Assets. ... Silar created Asset
16 Resolution as a ‘single purpose entity,’ conveyed all of its interests in the Repurchase
17 Agreement to Asset Resolution, and Asset Resolution properly foreclosed on the assets of
18 Compass, including the Purchased Assets.” (Citations omitted.) Asset Resolution LLC is
19 now a debtor in a chapter 7 bankruptcy case pending in Nevada, case no. BK-S-09-32824-
20 RCJ, along with certain affiliates.¹ William A. Leonard, Jr. was appointed trustee in the
21 Asset Resolution case. By Order entered on July 19, 2010 by the Hon. Robert C. Jones in
22 the Asset Resolution Case, the servicing rights for 19 loans, including the ComVest Loan,
23 were transferred to Cross, FLS.

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26 ¹ 10 90 SPE LLC, Fiesta Stoneridge LLC, CFP Gramercy SPE LLC, Bundy 2.5 Million SPE LLC, CFP
Cornman Toltec SPE LLC, Bundy Five Million LLC, Fox Hills SPE LLC, HFAH Monaco SPE LLC,
Huntsville SPE LLC, Lake Helen Partners SPE LLC, Ocean Atlantic SPE LLC, CFP, Gess SPE LLC, CFP
Brookmere Matteson SPE LLC, and Shamrock SPE LLC.

1 The Trust has attempted to monitor loan collections through monitoring the district
2 court litigation and the Asset Resolution bankruptcy case, but has received limited
3 information concerning servicing and resolution of direct loans by Compass/Silar/Asset
4 Resolution or their successors, including the trustee in bankruptcy for Asset Resolution.
5 The Trust has also been in contract with Cross FLS about the ComVest Loan. The
6 following is the extent of the USACM Trust's information on the current servicing and
7 status of the ComVest Loan.

8 **b. The ComVest Loan**

9 USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding
10 for an acquisition and development loan to borrowers identified as "ComVest Capital
11 Advisors, Inc."² A copy of the Offer Sheet is attached hereto as **Exhibit B** and
12 incorporated by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed was
13 \$4,500,000. *Id.* The Offer Sheet described the investment as a "First Trust Deed
14 Investment" and noted that the investment would be secured by a first deed of trust on
15 "approximately 60,000 square feet with an apartment complex with a total of 36 units."
16 *Id.* The collateral was located approximately one hour from Orlando, in Satellite Beach,
17 Florida. *Id.* Pursuant to the Offer Sheet, the Borrower was going to purchase the
18 apartment complex and convert them into condominium units. *Id.* The loan to value was
19 66% "based on estimated retail sell out...." *Id.*³ The Trust's review of the USACM loan
20 files found numerous documents purporting to address the then current value of the
21 collateral. The Trust has not been able to confirm which document(s) were in fact
22 provided to the Direct Lenders. The anticipated loan to value was anywhere from the
23 purported 63% to as much as 113%.

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25 ² The loan was ultimately made to a different entity, ComVest Capital Satellite Arms, Inc.

26 ³ Pursuant to the Offer Sheet, an appraisal had been ordered, but the Trustee has not been able to determine
whether an appraisal was ever performed.

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On January 11, 2006, Borrower made and delivered to various lenders, including the Direct Lenders identified in **Exhibit A**, a “Promissory Note Secured by Mortgage” (the “Note”) and a Loan Agreement. (Berman Decl., ¶ 5.) The Note and Loan Agreement provided for a loan of up to \$4,500,000, with an initial advance of \$3,500,000. *Id.* The USACM records reflect the initial loan was funded; no subsequent advances were made to the Borrower. The Note was secured by a “Mortgage, Security Agreement and Assignment of Rents” (the “Mortgage”) from Borrower in favor of the Direct Lenders, which was recorded in the official records of Brevard County, Florida on January 17, 2006 at Instrument Number 2006013674. (Berman Decl., ¶ 5.) The Note was also supported by an Unconditional Guaranty signed by William Lemke on January 12, 2006. (Berman Decl., ¶ 5.)

The USACM “Loan Summary” dated July 31, 2006 and filed in this case shows that Borrower was “Non-performing” on the Note as of July 31, 2006. (Berman Decl., ¶ 6.) During this bankruptcy case through the transfer of servicing to Compass, USACM treated the Direct Lenders with respect to any interim payments by the borrower in accordance with this Court’s orders and the confirmed Plan.

Counsel for the Trustee had a brief conversation with a representative of Cross, FLS regarding the status of the ComVest Loan. According to Cross, FLS, the Direct Lenders continue to have a secured interest in the collateral and are attempting to sell the Note, although the return is expected to be minimal. The lack of additional funding under the original loan agreement, though not mandatory, may have impacted the value of the underlying collateral.

c. The ComVest Claims

Exhibit A, attached, lists Proofs of Claim filed by Direct Lenders that appear to be based in whole or in part, upon an investment in the ComVest Loan. (Burr Decl. ¶ 7.) **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant’s address, the

total amount of the claim and the total amount of the claim that appears to be related to an investment in the ComVest Loan based upon the information provided by the claimant. (Burr Declaration ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the “ComVest Claims.” As required by Nevada LR 3007, a copy of the first page of the proof of claim for each of the claims referenced in **Exhibit A** are attached as **Exhibit C**.

II. JURISDICTION

The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

III. APPLICABLE AUTHORITY

Under the Bankruptcy Code, any Claim for which a proof of claim has been filed will be allowed unless a party in interest objects. If a party in interest objects to the proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim and shall allow the Claim except to the extent that the Claim is “unenforceable against the debtor . . . under any . . . applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b). A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof of claim controverts the presumption, the creditor ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996).

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IV. THE OBJECTION

The ComVest Loan appears to have been a legitimate, arms-length transaction. In addition, the Direct Lenders took a known risk by investing in a promissory note secured by a lien on real property.

USACM is not liable for the Borrower's default or any decrease in the value of the collateral. Although the subsequent advance under the loan documents was not funded (post petition), the Borrower could have sought additional financing from other lenders. Further, the loan documents did not require additional advances, but allowed for such additional advances. As such, the Trust does not believe the lack of additional advances is a direct cause of the subsequent diminution in value of the collateral securing the Direct Lender loans.

The Direct Lenders fail to state a claim because USACM does not appear to have breached the loan servicing agreements with respect to collection of the ComVest Loan. USACM was under no duty to foreclose on the collateral securing the ComVest Loan or take any other action.

This objection will only affect the Direct Lenders' proof of claim to the extent that it is based upon an investment in the ComVest Loan. This objection will not affect the proof of claim to the extent it is based upon an investment in a different loan.

This objection will not affect the Direct Lenders' right to be repaid on the ComVest Loan by the Borrower, to recover from the sale of any collateral that secured the ComVest Loan, or on the guarantees supporting the ComVest Loan.

V. CONCLUSION

The USACM Trust respectfully requests that the Court disallow the claims against USACM listed in **Exhibit A** to the extent those claims are based upon an investment in the ComVest Loan. This objection concerns only claims based upon an investment in the

1 ComVest Loan and not any other claims of any of the Direct Lenders. The USACM Trust
2 also requests such other and further relief as is just and proper.

3 Dated: July 24, 2011.

4 LEWIS AND ROCA LLP

5 By s/John Hinderaker (AZ 18024)
6 Robert M. Charles, Jr., NV 6593
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9 Copy of the foregoing and pertinent
10 portion of Exhibits deposited in U.S.
11 Mail, first class postage prepaid, on
July 24, 2011 to all parties listed on
Exhibit A attached.

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13 LEWIS AND ROCA LLP

14 s/ Matt Burns
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